that Solai is resident, and has for some years past been resident, only a few miles beyond the jurisdiction of the Court — not separated by oceans or continents. Nor can I be oblivious of the common practice of administrators coming into the Federation from India on a visitor's permit and leaving these shores no sooner had they extracted their grant of probate or letters of administration. No doubt such persons can, before their departure, appoint a delegate under the provisions of section 27 of the Trustee Ordinance, 1949, to perform the functions of their office, but they are under no obligation to do so, in which case, should they leave no attorney resident within the jurisdiction, any proceedings against them must involve recourse to the provisions of Order 11, R.S.C., for service out of the jurisdiction. The essential factor to be borne in mind in granting letters of administration in these cases is to ensure that the Court retains proper control over the assets of the estate, and such control the Court retains in the fullest measure over immovable property. Therefore, in all the circumstances of this case there appears to be every reason for and none against the appointment of Solai as administrator. The Court had jurisdiction to make the order; it was regularly made, after Palaniappa had failed to enter an appearance, and I do not find any good cause shown for revoking the grant to Solai.

In any event, I do not think that Palaniappa is competent to apply for the revocation. He can claim an interest in the property only if it is trust property; unless and until that fact is proved, it seems to me that I cannot act on any hypothesis which places him on the footing of a true beneficiary. No stranger to the estate can be heard in an application for revocation and it clearly remains to be proved that Palaniappa is not in fact a stranger.

In coming to my decision against revoking the grant to Solai I would add that I have not overlooked the second ground of complaint mentioned by Mr. Sault, namely, Solai's failure to disclose to the Court the grant of letters of administration made to Annamalai on July 20, 1953. In Solai's petition of April 2, 1958 reference to Annamalai was made in the following manner:

"7. That to the best of petitioner's belief application was fraudulently made to the High Court at Kuala Lumpur on 20.7.1953 by A.P.L. Annamalai Chettiar for a grant of letters of administration of the same estate."

It omitted certain particulars, namely, that Annamalai's application was made under Petition for Letters of Administration No. 68 of 1925, that the grant had been duly made in that petition, and that the death of Kasi after the grant had rendered it void or inoperative.

The result of such omission is that in respect of the same estate a grant of letters of administration had been made in two separate petitions. Mr. Sault's contention, as I understand it, is that, on the death of Kasi, the principal, the grant to his attorney Annamalai merely became inoperative, but even so, his grant ought to have been recalled and revoked, otherwise there would be two concurrent grants in respect of the same property. Mr. Sault cited *In re Dinshaw*, [2] but, with respect, I do not think that the case is any authority applicable to the instant case. I have also been referred by Mr. Ramani to *Suwerkop* v. *Day*, [3] *In the Estate of Syed Abdullah*, [4] and *In re the Estate of Murugappa Chettiar deceased*. [5] In the last two of them *In re Dinshaw* had been considered by Manning J. and Gordon-Smith J. in their respective judgments, but in both cases the facts are greatly different from those here. The law on the point, however, is to my mind quite clear. The death of the grantor of a power of attorney automatically revokes such power. A grant of letters of administration to an attorney limited in the usual terms cannot but lose all force and effect on the death of the attorney's principal. Indeed the grant in terms provides for its own avoidance. Hence I do not think it necessary before a new grant is made that the void grant should have to be formally revoked. *Suwerkop* v. *Day* is authority for this view, if any is required.

Solai's non-disclosure of the particulars in this case is not in my view of such culpable character as to amount to sufficient cause for revocation of his grant. It was not obtained by subterfuge, by stealth or by secrecy. Any mistake or irregularity as there was did not and could not in the circumstances have been misleading to the Court and I should have made the order as I did on February 20, 1960, had all the particulars omitted from the petition been fully set out.

The application is accordingly dismissed with costs.

Application dismissed.

Solicitors: *W. H. Sault; Braddell & Ramani.*

BANK OF CHINA v. LEE KEE PIN

[O.C.J. (Rigby J.) May 18, 1961]

[Penang — Originating Summons No. 358 of 1960]

Mortgage — Deposit of title deeds — Sale of land by mortgagee — Lease by mortgagor — Conveyancing and Law of Property Ordinance (Cap. 118), s.23 — Variation of conditions of sale.

The plaintiffs obtained judgment against the defendant for the recovery of $520,654.99 being moneys lent to and paid on behalf of the defendant together with the interest and bank charges due and payable thereon. No payment having been made by the defendant, the plaintiffs applied for and obtained an order for the sale of the defendant's property secured to them by way of deposit of title deeds, with vacant possession but, however, subject to "the existing right of any third party if any." The conditions of sale had been sent to the defendant and on the day before the sale took place the defendant insisted that the property be sold subject to a lease which he had granted to a third party for two years with an option to the lessee to renew for a

further two years. The existence of this lease had never been disclosed to the plaintiffs.

In an application to vary the conditions of sale so that the property may be sold with vacant possession,

Held: (1) a lease for two years with an option to renew for a further two years is not a lease for a term exceeding three years;

(2) in the circumstances of the case the rent was not so substantially below the best rent obtainable as to justify setting aside the lease; accordingly the lease was valid and the property must be sold subject to it.

Case referred to:—

(1) *Holt* v. *Dawson* [1939] 3 All E.R. 635.

APPLICATION.

Khoo Keat Siew for the plaintiff.

M. Abraham for the defendant.

Cur. Adv. Vult.

Rigby J.: This is an application to vary the Conditions of Sale in respect of the house and land comprising No. 125, York Road, Penang, the property of one Lee Kee Pin, pursuant to an Order made by me on the 28th November, 1960.

The history of the proceedings giving rise to this application are as follows. In July, 1959, the Bank of China, as plaintiffs, sued Lee Kee Pin, as defendant, by way of Specially Indorsed Writ, for the sum of $574,000 odd being moneys lent to and paid on behalf of the defendant by the Bank in the course of its ordinary banking transactions, together with the interest and bank charges due and payable thereon. Considerable difficulty was experienced in effecting service of the Writ on the defendant and an Order for substituted service had to be obtained. The defence was then filed pleading, *inter alia*, that by virtue of the provisions of the 1958 Banking Ordinance the plaintiffs had no right to sue for the money owing to them. That preliminary plea, which was wholly devoid of any equitable merit, was heard and dismissed by this Court in November, 1959. An appeal against that decision was lodged but later withdrawn. Pleadings in the action closed in December, 1959, but notwithstanding that fact, despite repeated written requests, the defendant failed to file any Affidavit of Documents until an Order to do so was issued by me in Chambers, at the instance of the plaintiffs, in February, 1960. In March, 1960, the case was transferred into the Fixing List for a date to be fixed for hearing. In April the plaintiffs obtained an Order for *lis pendens* in respect of the defendant's property, including the house at 125, York Road. In May a Consent Order was made for accounts to be taken. In September, after accounts and inquiries had been taken and made before him the Registrar issued his Certificate that the plaintiffs were entitled to payment from the defendant of $520,654.99. In October, no payment whatsoever having been made by the defendant of any of the moneys found due by him to the plaintiff Bank, the Bank applied by way of Originating Summons for an Order for sale of the defendant's two properties, one of which was 125, York Road, secured to them by the defendant by way of deposit of title deeds. Again, the defendant could not be found and an Order for substituted service had to be obtained. However, subsequently the application was heard in November, 1960. At the hearing of the application it became apparent that the defendant and his family were all living at 125, York Road. Although there is no note of it upon the record, as far as my memory serves me some vague suggestion was put forward by Mr. Lim Huck Aik, as counsel then appearing on behalf of the defendant, that there might be in existence some agreement of lease of the property between the defendant and some member of his family. What is quite clear, however, is that although there was considerable argument as to the precise terms that ought to be used in the Order for sale no mention whatsoever was made as to the existence of a definite lease of the premises. An Order was then made by me on the 28th November, 1960, directing, *inter alia*, that the premises be sold "with vacant possession but subject to the existing right of any third party, if any." In February, 1961, a summons was taken out returnable before the Registrar on the 7th March, for an Order to proceed with the sale by public auction on the 6th April, subject to a reserve price fixed by the plaintiffs and approved by the Registrar. An Order was made accordingly. On the 5th April, a day before the sale was due to take place and after the Conditions of Sale had been sent to the defendant's solicitors for approval, the defendant's solicitors thought fit to insist that the property be sold, subject to a lease, which they produced for the first time and the existence of which had never previously been disclosed. Such is the somewhat disgraceful history of these proceedings. There is not the slightest doubt in my mind that the defendant, from the very outset, has done everything possible to resist and obstruct the plaintiff Bank's perfectly legitimate claim to recover sums of money due and owing to them by the defendant. Equally there is no doubt in my mind that anticipating that judgment must necessarily be given against him, he sought to prevent the inevitable sale of his property by entering into a lease of his house to a third party for a period of years. It is obvious now, and it must have been obvious then, that a sale of his house, with vacant possession, would fetch very considerably more than a sale subject to the right of possession of an existing tenant. The proceedings do little credit to the defendant nor, I regret to say, to the solicitors then acting on his behalf. But I am not, at this stage, concerned with the morals of the matter but simply whether or not the lease is a valid one or whether I have any power, in these proceedings, to set it aside.

The circumstances in which the lease was entered into can be briefly stated. On the 16th March, 1960, — 7½ months after these proceedings had been instituted against him but 6 months before the Registrar's Certificate had been issued

declaring that he owed the plaintiff over half a million dollars — the defendant leased his house at 125, York Road to the General Rubber Trading House Ltd., a company incorporated in Singapore and having an office in Penang. The lease was duly stamped on the 19th March. It was for a period of two years with an option to the lessee to renew for a further two years. The rent was $170 per month.

It is not disputed that throughout the whole period since it was leased the defendant and his family have continued to live in and occupy the whole premises. The arrangement was that the house was intended to provide residential accommodation for the proposed new Manager of the Company's Penang Branch on his transfer from Singapore. In the interval the house — or, rather, one room in the house — was used by the Company's Managing Director, a personal friend of the defendant, on his periodical business visits to Penang. Such visits took place every one or two months and lasted for 2 to 7 days each visit. Part of the house is also used from time to time, by the Penang Manager of the Company, at their volition, as a recreation room.

The powers of a mortgagor in possession, as against the mortgagee or any incumbrancers, are contained in section 23 of the Conveyancing and Law of Property Ordinance (Cap. 118). The mortgagor may enter into an occupation lease of his mortgaged land for any term not exceeding 3 years and providing, *inter alia*, that such lease "shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case."

Mr. Khoo Keat Siew, who has argued the case for the plaintiff Bank most strenuously, contended that he was entitled to impeach the validity of the lease on the ground that both these conditions had not been complied with, namely, that the lease was for more than 3 years and that the rent was not the best that could reasonably be obtained. He contended that a lease for 2 years with an option given to the lessee to renew for a further 2 years, was, in effect, a lease for a term exceeding 3 years. I do not think that this is a correct view. I think the position is correctly stated in Cheshire's *Modern Real Property*, 6th edition, page 132, in the following passage:—

> "A lease exceeds 3 years . . . . . only if it is one which *must* last for longer than that period. If it designates a period which *may* be less than 3 years, then it is valid without any formalities, even though it is capable of lasting longer."

Turning now to the rather more difficult problem of the alleged inadequacy of the rent. Evidence was given by an experienced assessor that the house was situated in a first-class residential area; that there was a considerable demand for this type of house; and that there should have been little difficulty in March, 1960, in letting the house for a rental of $400 per month. He admitted that the demand for such houses came mostly from the R.A.F. and R.A.A.F., although he added that there was, to his knowledge, some local demand for houses at such a rental. The defendant said that he had based the rental on the annual rateable value. Under the Contract of Lease the lessee had also to pay all conservancy charges, electric light and water, and all rates and taxes. The lessee was a friend of his, with whom he had had business dealings in the past. There was also the undoubted factor that the lessee permitted him and his family to remain in the house, though the Company's Managing Director said he made it clear to the defendant, on the occasions when he visited Penang, that he would have to look for alternative accommodation elsewhere. The words contained in the subsection of the Ordinance are that the lease shall reserve "the best rent that can reasonably be obtained, regard being had to the circumstances of the case." I am reluctantly of the opinion that, considering all the circumstances of the case, the evidence before me is not such that I can fairly and properly say that the rent was so substantially below the best rent obtainable as to justify me setting aside the lease.

Finally, Mr. Khoo Keat Siew somewhat belatedly took the point that the lease itself was not admissible in evidence under section 5 of the Registration of Deeds Ordinance (Cap. 121). Whilst conceding that under section 26 of the Ordinance leases for under 3 years were excluded from the provisions of the Ordinance he contended that that only applied in the case of leases under 3 years where the granting of the lease was "accompanied by actual possession from the making of such lease....." He argued that the evidence given negatived the fact that the lessee had actual possession of the house from the date of the signing of the lease, and he contended that the possession in fact remained with the lessor who continued to live in the house with his family. It is perhaps unfortunate that the lessee was not asked the direct question whether the defendant, at the time of the lease, had given him the key to the house since the handing over of the key is, to quote the words of Scott L.J. in *Holt* v. *Dawson*, [1] "a symbolic act which at common law carries with it possession of that to which the key is the means of access." But I see no real substance in Mr. Khoo Keat Siew's contention. The facts show that not only could the lessee make use of the house as and when he wanted to do so, but also that the Penang Branch of the company resorted to it when they wished to use it, or part of it. Those facts, to my mind are sufficient to establish actual possession of the property.

For all these reasons, with considerable regret, I have come to the conclusion that this application must be dismissed and I must decline to vary or alter the Conditions of Sale in such a manner as to direct that the property be sold with vacant possession. My original Order must therefore stand.

Since it is abundantly clear that the whole of these proceedings have become necessary by reason of the defendant failing to declare from the very outset the existence of this lease, I order that the plaintiffs' costs of this application be taxed and paid by the defendant.

Application dismissed.

Solicitors: *Hogan, Adams & Allan; M. Abraham.*

LIM LIAN HOE v. TAN MENG SAN

[O.C.J. (Ong J.) May 31, 1961]

[K.L. — Civil Suit No. 8 of 1960]

Practice and Procedure — Prohibitory order under R.S.C. O.43 r.2(1) — Extension of O.43 r.2(7) — Amendment of Statement of Claim and Judgment — The "slip rule" — Judgment under O.13 r.3.

The plaintiff on February 5, 1960 obtained judgment in default of appearance against the defendant personally. On February 12, 1960 a prohibitory order was issued against the defendant in respect of the whole land held under C.T. 4135 which was in the name of the defendant "as representative." On December 2, 1960 the judgment-creditor obtained an order that (1) the Statement of Claim and the interlocutory judgment dated February 5, 1960 be amended by adding the words "executor and representative of" — immediately after the name of the defendant; (2) the defendant be restrained from transferring and changing the land held under C.T. 4135 for 6 month. On May 13, 1961, the plaintiff applied for an extension of the prohibitory order.

Held: (1) the judgment creditor cannot make the estate of the deceased liable on contracts entered into by the representative;

(2) when a judgment drawn up gives effect, and no more than effect, to the intention of the Court, it cannot be corrected under r.11 or r.12 of O.28;

(3) the amendment seeks to alter the very judgment itself, from one *de bonis propriis* to one *de bonis testatoris*, and must therefore be disallowed;

(4) the first prohibitory order issued on February 12, 1960 had lapsed after 6 months, and no special circumstances justify the extension of that order.

Cases referred to:—

(1) *Farhall* v. *Farhall* L.R. 7 Ch. App. 123.

(2) *In re Morgan, Pillgrem* v. *Pillgrem* L.R. (1881) 18 Ch. D. 93.

(3) *MacCarthy* v. *Agard* [1933] 2 K.B. 417.

(4) *Pearlman (Veneers) S.A. Pty. Ltd.* v. *Bernhard Bartels* [1954] 1 W.L.R. 1457.

(5) *Savena Supramaniam Pillay* v. *Tan Kah Chiat* [1934] M.L.J. 133.

APPLICATION.

K. L. Devaser for the plaintiff.

Defendant in person.

Cur. Adv Vult.

Ong J.: This is an application by summons-in-chambers on the part of the judgment creditor asking for a prohibitory order in respect of approximately 102 acres of land held under C.T. No. 4135, for Lot No. 1791, situate in the Mukim of Ampangan, in the District of Seremban, and registered in the name of the judgment-debtor "as representative." What purported to be an original application for a prohibitory order under R.S.C. Order 43, rule 2(1) proved to be in fact an application for an extension of an earlier prohibitory order issued on December 5, 1960. The affidavit of the judgment-creditor filed in support of his application not only failed to show any "special circumstances" to "render an extension just" — as provided under Order 43 rule 2(5) — but was in other respects so unsatisfactory as to lead me to peruse the whole of the file in this action, with disquieting results.

By a Specially Indorsed Writ indorsed with a statement of claim, and filed on January 13, 1960, the plaintiff claimed the sum of $9,000, being refund of part payment of the purchase price of a 26-acre portion of C.T. 4135 agreed to be sold to him by the defendant, and damages for breach of contract. The defendant entered no appearance, but by his defence, filed on January 21, 1960, admitted his own personal liability. Judgment in default of appearance was duly entered against the defendant on February 5, 1960, under Order 13 rule 3. On the application of the judgment-creditor for seizure in execution, the Senior Assistant Registrar issued a prohibitory order on February 12, 1960 against the defendant in respect of the whole land held under C.T. 4135. For some extraneous reason, which is not clear from inspection of the file, no sale took place, and the matter remained in *status quo* until the judgment-creditor retained Mr. K. L. Devaser as his advocate and solicitor on September 12, 1960. On October 5, 1960 he filed a summons-in-chambers (Encl. 15) in terms identical with the one dated May 13, 1961 (Encl. 24) now before me. The affidavit in support took no account of the provisions of Order 43 rule 2(7). On December 2, 1960 the judgment-creditor, through his solicitor, filed a further summons-in-chambers (Encl. 18) applying for:

(1) an order that leave be granted to the plaintiff to amend the Statement of Claim indorsed on the Writ of Summons issued herein in the manner as shown in red ink in the Amended Statement of Claim marked Exhibit "A2" and attached to the plaintiff's affidavit affirmed on the 13th day of August, 1960 and filed herein in support of this application; and as a consequential order the *interlocutory* judgment dated the 5th February, 1960 be amended by adding the words "executor and representative of Lim Ah Hong (f) deceased" immediately after the name Tan Meng San the defendant herein.

(2) a prohibitory order against the defendant/respondent prohibiting and restraining him from transferring and charging the land comprised in Certificate of Title No. 4135 Lot 1791 mukim of Ampangan in the District of Seremban in area 102 acres 0 rood 30 poles subject to caveats and prohibitory orders for a period of six months from the date of the Order.

I do not understand how a judgment under Order 13 rule 3 can be described as an interlocutory judgment. However, on December 20, 1960 Mr. Devaser obtained from the Judge an order in terms. He now asks for an extension of the prohibitory order for a further six months.

When Mr. Devaser appeared before me in Chambers I informed him that he could not expect me to make the order as prayed or any other order; but, since he was insistent that he had ample authority to cite in support of his contention, I adjourned the further hearing into